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Spying and the law: Keeping a balance

By BENJAMIN R. CIVILETTI

Can effective intelligence activities that help us formulate a workable foreign policy in these times of crises be conducted under the rule of law? That question is one that I must face each day as this country's chief law enforcement officer.

These are troubled times for international observance of the law. Soviet armed forces have invaded Afghanistan—a sovereign nation—and installed a puppet government. A band of terrorists continues to hold United States diplomats hostage in the American Embassy in Tehran. The International Court of Justice has ruled unanimously that the hostages must be freed, yet the outrage of their detention continues.

As Americans who believe in the law, we become frustrated when the law is broken with apparent impunity. We may be tempted to reject the very concept of the law itself and to engage in acts we would otherwise condemn. There are indications that such feelings are astir within the United States today.

But frustration should not propel us to quickly abandon the application of the rule of law to the intelligence activities of the U.S. government. In our recent history the sobering instances of excess in the conduct of intelligence activities remind us that the troubles of the present do not negate the relevance of the past. They may, however, help us achieve a balanced understanding of the role of legal guideposts in the gathering of essential foreign intelligence.

Most of these guideposts are built on the basic assumption, visible both in court decisions and executive branch regula-

Mr. Civiletti is Attorney General of the United States. This article is derived from a speech given at The Bryn Mawr School in February.

tions on intelligence activities, that the goals and purposes of intelligence and counterintelligence are fundamentally different from those of domestic law enforcement; and thus that these activities must be regulated differently. Law enforcement is intended to prevent, deter, discover and punish acts the society deems unacceptable. Intelligence and counterintelligence activities are intended to acquire information so the president and his advisers can make informed decisions in the conduct of international diplomacy, foreign relations and national security affairs.

There is, of course, an area of investigation in which intelligence and law enforcement interests intersect. This is particularly true in the area of counterintelligence, where the United States government attempts to monitor clandestine information-gathering by agents of other countries within our own borders.

Many forms of espionage by foreign countries within the United States are crimes under United States law. Nevertheless, some counterintelligence professionals believe criminal prosecutions should never be brought against hostile agents, since doing so may only cause their replacement by other, unknown agents of whose activities we may not be aware.

Moreover, practical problems of "graymail" may inhibit prosecution. That is, criminal proceedings may not only confirm the accuracy of classified information that has been passed to a foreign power, but may also reveal at least some of the material to a far wider audience. But the problems are not insurmountable, and in the three years of the Carter administration, more espionage prosecutions have been brought into court than in the previous 11 years.

Even where prosecution is not a possibility, though, it should be obvious that our ability to collect foreign intelligence and counterintelligence must be kept strong and effective. The national leadership simply requires the best information that

can be obtained concerning the intentions and activities of foreign powers. Current events have underscored this basic fact.

The ability of the United States to react to events in foreign lands is limited under any circumstances. Without timely and accurate information, the ability to react positively is eliminated entirely.

It is also evident that effective intelligence activities demand secrecy. Even if we are able to penetrate successfully the wall of secrecy surrounding a hostile foreign nation, our success will be as short-lived as the mayfly if we disclose the fact of our success.

None of these observations would be at all controversial were it not that intelligence activities can come perilously close to intruding on our most basic statutory and constitutional rights. This inherent danger is made even more intense by the highly sophisticated technological advances that are used commonly throughout the world today.

High technology widens the range of possible intelligence activities, increases the volume of information that can be collected and disguises the traditional criteria of propriety. The secrecy essential to intelligence activities simultaneously prohibits the review of doubtful actions in any public adversarial process, such as a trial in court.

The near absence of judicial review of intelligence matters requires redoubled effort within the executive branch of the government to insure that these activities are not exempted from all responsible checks and balances. This need to create new mechanisms to regulate and review intelligence activities has occupied surprisingly large amounts of my time as attorney general, as well as that of my two most recent predecessors.

The efforts of recent attorneys general to create effective oversight mechanisms have had only a small amount of precedent to build on. The National Security Act of 1947, which created the Central Intelligence Agency, was perhaps the first pub-

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lic declaration in law by any nation of the existence and functions of its intelligence service, and it is remarkably concise.

In five short subparagraphs it instructs the CIA to collect intelligence and perform other functions related to intelligence at the direction of the National Security Council. The sole restriction in the only "intelligence law" then available was the proviso that the CIA should not have any police, subpoena or law enforcement powers or internal security functions.

Aside from the espionage statutes enacted originally in 1917 and subsequently amended, and various administrative housekeeping laws, there were no other laws relating to U.S. intelligence activities until the 1970s.

Faced with an absence of relevant law and precedent and an array of general-purpose laws not appropriate to their endeavors, it was a simple and rational matter for the government or its intelligence agencies to assume that intelligence efforts were so "different" or so "special" that modified legal standards applied to them.

The deference shown to intelligence matters for almost 30 years by the public, press, judiciary, Congress, executive officials, various presidents and attorneys general contributed significantly to the validity of the assumption.

Over the past few years this has changed, and there has been a rapid development of intelligence law. This development has been marked by occasional pain, by serious claims of damage to the intelligence capabilities of the United States, and by frequent and extensive internal debate.

I can state confidently, though, that while there may be some confusion about how law applies to a particular matter, there is no longer any doubt in the minds of individuals associated with the intelligence and national security apparatus that intelligence activities are subject to definable legal standards.

One of the earliest developments was in February, 1976, when President Ford issued Executive Order 11905, the first official public statement of a set of coherent standards, authorizations and prohibitions to govern the practices of our intelligence agencies.

After two years of government experience that showed some shortcomings under that order, President Carter, in January, 1978, issued Executive Order 12036 which, unlike its predecessor, required that multiple sets of procedures be developed and approved by the attorney general to govern the complete range of collection and dissemination practices by all the intelligence entities where the information collected or disseminated pertained to persons entitled to the protection of the U.S. Constitution. The United States stands alone as the only country that has issued such a comprehensive statement.

nately excludes the general public from detailed discussions of the application of this body of law, public debate in Congress has played an extraordinarily important role in the development of the law of intelligence. In 1978, Congress passed the Foreign Intelligence Surveillance Act. Thanks to this statute, no unconsented electronic surveillance is now conducted for intelligence purposes in the United States without the approval of a federal judge.

In addition, extensive discussions and careful reviews have been taking place between administration and congressional representatives regarding the development of comprehensive charter legislation for the intelligence agencies. This process has proved far more difficult than many had anticipated. The effort to reach consensus on a charter that gives the agencies sufficient flexibility to meet changing situations to protect our security, without delegating to them virtually unlimited discretion, has proved herculean.

Within the framework of the Constitution, statutes, and existing rules and regulations, it is my responsibility as attorney general to provide advice to intelligence agencies as to whether specific activities they are proposing are lawful.

Of course, I do the same for all agencies in the executive branch. But the process of ascertaining intelligence law does differ from the process of applying the law in other areas in one crucial respect. The precedents we develop and the rules we employ are, to a great degree, a body of esoteric law that is not frequently subject to judicial review or public comment. The American principle of checks and balances can be mooted when it comes to intelligence activities.

Thus, it is extremely important that we maintain and, to the extent possible, institutionalize in the executive branch a process for obtaining a multiplicity of views on the fundamental legal issues arising from intelligence activities.

In the Justice Department, I have seen to it that I receive advice on these matters from former CIA employees and from members of the American Civil Liberties Union, as well as from different units with diverse points of view. It is likewise important for the heads of the intelligence agencies to facilitate meaningful in-house criticism of their proposals.

The current emphasis on legal requirements in intelligence activities is a result of the excesses of the recent past. But current events tend to provoke further analysis. Some may argue that attempts to regulate intelligence activities are futile, or at least question seriously the weighing of costs and benefits in light of the enormity of hostile acts abroad. Such reexamination is necessary and constructive. But it must not cause us to lose sight of the past.

Watergate did happen. CHAOS was an actual program, as was COINTELPRO. Those abuses had their beginnings in action that appeared "necessary" and "rea-

But the programs grew, the justifications expanded and responsibility disappeared.

The proliferation of law in the conduct of intelligence activities has not been entirely without cost. The rapid development of intelligence law that we have witnessed in recent years has in fact limited some of the flexibility and ease of action formerly enjoyed by intelligence officials.

But what have we gained? Those working in intelligence now operate under the most lucid statements of authority that have ever been available to them. Intelligence agencies have clear and unambiguous limitations on their authority. The protection of the individual rights and liberties of our citizens from infringement by intelligence activities is at a high point. Most of the reforms are fixed and others are gaining maturity.

Nevertheless, this is an important time to be aware that the unfinished agenda of lawmaking in intelligence includes some important items for the legitimate protection of our intelligence activities. Existing law provides inadequate protections to the men and women who serve our nation as intelligence officers. They need—and deserve—better protection against those who would intentionally disclose their secret mission and jeopardize their personal safety by disclosing their identities.

We also need to adopt legal procedures to deal with "graymail," where criminal defendants can escape punishment by threatened public disclosure of remote secret information during a criminal trial. We have been successful in most cases. But the ability of the courts to protect legally irrelevant secret information from unnecessary disclosure must be strengthened.

Further protection for the intelligence community could be effected by a change in the Hughes-Ryan Amendment of 1974, which requires timely reporting of covert action projects to about eight congressional committees.

That cumbersome procedure disseminates knowledge of these proposals to such a large number of persons that the secrecy essential to success becomes doubtful. A carefully crafted amendment to the statute should be made to require reporting to only the Senate and House intelligence committees.

While we pursue legislative solutions to such problems, the process of self-regulation in the executive branch must and will continue. Many of the regulations are publicly available, and as they gain wider review we will all benefit from wise analysis and critical comment.

If our concerns about the current international situation lead us to continue to examine our rules for conducting intelligence activities objectively, rather than to envy and to imitate the seeming efficiency of the tactics of totalitarian nations, we will not, I am confident, abandon our progress or retreat from what we have gained.